IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.295 OF 2006

Mr.Hemant D.Shah & others. ...Petitioners.

Vs.

1.Chittaranjan D.Shah & others ...Respondents.

Mr.Pradip Sancheti i/b. Khaitan & Co., for Petitioners.

Mr.Aspi Chinoy with G.C.Mohanty, for Respondent no.8.

Mr.Ketan Parikh with Denzil D'Mello, for Respondent nos.1 to 4 and 6.

CORAM: D.K.DESHMUKH,J.

DATED: 22nd August, 2006.

P.C.:-

1. Leave to amend. Amendment to be carried out within one week from today.

2. The learned Counsel appearing for

petitioners states that the petitioners do not press for interim relief in terms of prayer clause (a) and prayer clause (d1) added by amendment. He further states that he will make an application for those reliefs before the learned Arbitrator under Section 17 of the Arbitration and Conciliation Act. The statement is accepted. The learned Counsel appearing for Respondent nos.1,2,3,4 & 6 states that for a period of one week from today Respondent nos. 1 to 4 and 6 will not issue any direction to the Respondent no.8 – Company in relation to the amount of Rs.5,00,00,000/- (Rupees Five crores only) which is presently lying with the Debt Recovery Tribunal. The statement is accepted.

3. So far as the interim relief claim in terms of prayer clause (b) is concerned, a direction is sought against the Recovery officer of the Debt Recovery Tribunal not to disburse the amount of Rs.5 crores which is in deposit with the respondent no.7 and which belongs to respondent no.8 Company. It is a common ground that this relief is consequential to the reliefs prayed for by prayer clause (c) and prayer clause (d) and that by itself this relief against respondent no.7 cannot be granted. The point

to be considered is that whether the petitioner is entitled to interim order under section 9 of the Arbitration and Conciliation Act against respondent no.8? The admitted position is that respondent no.8 is not a party to the arbitration agreement. There was some debate before me as to whether under Section 9 of the Act, this Court can issue interim direction against a person who is not a party to the arbitration agreement. In my opinion, however, it is not necessary for me to inquire into that aspect of the matter for deciding this petition in so far as prayer clauses (b), (c) and (d) are concerned. The learned Counsel appearing for petitioners submits that the interim relief that they have claimed in this petition are covered by section 9(ii)(c) of the Arbitration and Conciliation Act.

> “9(ii)(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tired, which

> may be necessary or expedient for the purpose of obtaining full information or evidence;

Perusal of the above provision shows that the property in relation to which interim direction is sought is subject matter of the dispute in arbitration proceedings. By my order passed in the Arbitration Petition no.544 of 2001 in the case "Datar Switchgear Vs. M.S.E.B. & others" dated 18.2.2002, I have already taken a view that under Section 9 of the Act interim order can be made by the Court only in relation to the property which is subject matter of the arbitration proceedings. Now the question that is to be considered is whether the amount of Rs.5 crores which is lying in deposit with the Debt Recovery Tribunal can be termed as the subject matter of the dispute in the arbitration proceedings?.

4. According to the petitioners, the petitioners are claiming a decree of the amount of about Rs.20 crores against the respondent nos.1 to 6 pursuant to the memorandum of understanding, copy of which is at Exhibit "C" to the Arbitration Petition. Clause (6) of the Memorandum of understanding is

relevant for the present purpose which reads as under:-

> “6. (i) That CHITTARANJAN D SHAH group has agreed to pay to the members of HEMANT D. SHAH group, the abovesaid sum of Rs.20,00,00,000/- (Rupees Twenty crores only) to the Hemant D. Shah group as under:-
>
> To Shri.HEMANT D. SHAH
> Rs.10,00,00,000/-
> (Rupees Ten Crores only)
>
> To Smt.Kokila H.Shah
> Rs.10,00,00,000/-
> (Rupees Ten Crores only)
>
> (ii) It is agreed that the abovesaid sum shall be paid by Shri.CHITTARANJAN D. SHAH on or before 31st December,1996.
>
> (iii) <u>For securing the payments to be made by CHITTARANJAN D SHAH group to the HEMANT D. SHAH group, Shri.CHITTARANJAN D.SHAH hereby agrees</u>:-
>
> (a) That CHITTARANJAN D SHAH group will allot and/or to transfer rights 25% of the total area that may available for construction upon development of the property at Worli belonging to M/s.Manish Estate (P) Ltd., to Shri.HEMANT D SHAH and/or his nominee as may be nominated by him. The cost of such premises to be allotted is agreed

at Rs.5,00,00,000/- (Rupees Five crores only) which CHITTARANJAN D. SHAH group is entitled to adjust against the amounts payable by CHITTARANJAN D SHAH group to Shri.HEMANT D. SHAH mentioned in para 6(i) hereinabove.

(b) Against the amounts agreed to be paid to HEMANT D. SHSH group as in para 6(i), Shri.HEMANT D.SHAH group will transfer their shareholdings in M/s.Manish Estates(P) Ltd. It is agreed that for the period of 3 years, within which period CHITTARANJAN D.SHAH group has agreed to pay the abovementioned payments to HEMANT D. SHAH group, HEMANT D SHAH group will not exercise voting rights in respect of the said shares and will not interfere in the affairs and activities of the said Company except in case of variation of interest of such shareholdings."

Perusal of clause (6) of the Memorandum of Understanding quoted above shows that there was an agreement to pay Rs.20 crores to the petitioners. The petitioners are also seeking Award in their favour and against respondent nos. 1 to 6 in the

amount of Rs.20 crores The subject matter of the arbitration therefore is the amount of Rs.20 crores which the petitioners are claiming from respondent nos.1 to 6 pursuant to the memorandum of understanding. In my opinion, the subject matter of the Arbitration would be only that property in relation to which final claim is made in the arbitration and it is that property which can be described as the subject matter of the arbitration. The amount of Rs.5 crores is not even mentioned in the memorandum of understanding. It becomes relevant only for the purpose of securing payment of Rs.20 crores. which is agreed upon. Therefore, in my opinion, the amount of Rs.5 crores which is lying in deposit with the Debt Recovery Tribunal which is sale proceeds of the property which is mentioned in clause (6)(iii)(a) of Memorandum of Understanding can not be said to be the subject matter of the arbitration.

5. The second aspect of the matter that is to be considered is when the amount of Rs.5 crores lying in deposit with the Debt Recovery Tribunal is admittedly the property of respondent no.8 Company and when the Respondent no.8 Company admittedly is not a party to the arbitration agreement, and

therefore, is not a party to the arbitration proceedings also, can the property of the Respondent no.8 be the subject matter of dispute in arbitration proceedings? It is difficult to say that without Respondent no.8 company being a party to the Arbitration proceedings the property of Respondent no.8 Company can be the subject matter of dispute in the arbitration proceedings. Because if the property of respondent no.8 company is the subject matter of the arbitration it would mean that the arbitrator would be competent to make an award in relation to that property. As the respondent no.8 company is not a party to the arbitration proceedings it is impossible to believe that the property of the respondent no.8 company is the subject matter of dispute in the arbitration in relation to which the arbitrator can make a final award. If an arbitrator makes any award in relation to a property which belongs to a person who is not a party to the arbitration proceedings, the award will be invalid as it would violate the principles of natural justice. It can not be assumed that the scheme of the Act permits an arbitrator to act in violation of the principles of natural justice. Taking overall view of the matter therefore, in my opinion, a direction

claimed by this petition under Section 9(ii)(c) of the Act in relation to the property of respondent no.8 company cannot be made by this Court in exercise of its jurisdiction under Section 9 of the Arbitration and Conciliation Act. The arbitration petition is disposed of.